SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 848.

BEHN, MEYER & COMPANY, LIMITED, APPELLANT,

vs.

THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN OF THE UNITED STATES, AND FRANK WHITE, AS TREASURER OF THE UNITED STATES, APPELLEES.

SUPPLEMENTAL BRIEF ON BEHALF OF LAZARUS G. JOSEPH, RECEIVER OF BEHN, MEYER & COMPANY, LIMITED, AND PETITIONER FOR LEAVE TO INTERVENE.

MARION BUTLER,
JOHN W. CLIFTON,
HENRY D. GREEN,
Counsel for Lazarus G. Joseph, Receiver, etc.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 343.

BEHN, MEYER & COMPANY, LIMITED, APPELLANT,

vs.

THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN OF THE UNITED STATES, ET AL.

SUPPLEMENTAL BRIEF ON BEHALF OF LAZARUS G. JOSEPH, RECEIVER, ETC.

Supplementing their former brief filed herein, counsel for Lazarus G. Joseph, petitioner for leave to intervene, respectfully submit the following:

Supplementing their remarks concluding the first paragraph on page 66 of the brief, counsel for the petitioner submit that though they have searched diligently they have not been able to find any case holding directly on this point which supports the contention of the plaintiff as set out in

the answer to the motion of your petitioner and considered on pages 64-66 of your petitioner's brief. It is settled law that the mere pendency of an appeal, though it operate as a supersedeas, does not prevent all action in the premises by the parties involved. Indeed it has been held that the pendency of an appeal from a judgment in appellant's favor does not prevent him from instituting proceedings to revive the judgment. Weiller *vs.* Blanks, McGloin, 296.

Counsel also submit for the consideration of the court the case of Grant *vs.* Phœnix Mut. Life Ins. Co., 121 U. S., 118, the synopsis of which under the heading Receivers in the Century Digest is: Pending an appeal from a final decree with a supersedeas, a receiver obtained an order from the court directing the expenditure of funds to repair the properties to save it from waste; held no error, since the supersedeas simply suspended action in regard to executing the final decree and the order in question was confined simply to the preservation of the properties.

While this case is not squarely in point, it is submitted that it indicates the reasoning upon which the power of the receiver to bring this petition of intervention may properly be based. This action by the receiver is necessary to preserve the property. If the petitioner is ultimately held to have been rightfully appointed, then he and not these present plaintiffs are entitled to the fund here in question. Even if the corporation were properly before the court and were properly bringing this proceeding, it could not recover this money as against the receiver of its business in the Philippine Islands, as has been pointed out fully in the brief of the petitioner at page 80. To hold, therefore, that though the force and effect of the order removing him is stayed yet

the receiver cannot here intervene, would be to hold that the receiver must during the pendency of the appeal be powerless to protect in case of need the assets of the company of which he is receiver from being dissipated and purloined. Such cannot be the law, and it is respectfully submitted, such will not be the ruling of this court.

Supplementing their remarks concluding the second paragraph on page 66 of the brief, counsel for the petitioner respectfully calls the attention of the Court to Sections 123 and 144 of the Code of Civil Procedure of the Philippine Islands:

> SECTION 123. No interlocutory or incidental ruling, order, or judgment of the Court of First Instance shall stay the progress of an action or proceedings therein pending, but only such ruling, order or judgment as finally determines the action or proceeding nor shall any ruling, order or judgment be the subject of appeal to the Supreme Court until final judgment is rendered to one party or the other.
>
> SECTION 144. Except by special order of the court, no execution shall issue upon a final judgment rendered in the Court of First Instance until after the period for perfecting a bill of exceptions has expired. But the filing of a bill of exceptions shall of itself stay execution until the final determination of the action, unless for special reasons stated in the bill of exceptions the court shall order that execution be not stayed, in which event execution may at once issue. But the Court may require as a condition of a stay of execution that a bond shall be given reasonably sufficient to secure the performance of the judgment appealed from in case it shall be affirmed in part or wholly.

We submit that under the above sections of the Code by the perfecting of a bill of exceptions in the case of Behn, Meyer & Co., Ltd., *vs.* Stanley *et al.* the force and effect of the order vacating the receiver is stayed, and that the receivership remains in sufficient force and effect to permit the receiver to intervene in this proceeding.

We submit that this case is controlled by the above section for the reason that the action of the court in dismissing this receiver is a judgment within the meaning of the statute.

The term "judgment" is susceptible of a broad or a narrow construction. Its broad sense is the decision or sentence of the law given by a court or other competent tribunal as the result of proceedings instituted therein. In the broad sense here defined a decision of any court is a judgment including courts of equity, admiralty and probate.

It is submitted that judgment as used in this statute should not be confined to the narrow sense of the decision of the court in a law case.

"The final determination of a cause is a judgment." 33 C. J. 1050. "The word 'judgment' includes all that is meant by the words order, decision, decree or judgment." Halbert *vs.* Alford, 16 S. W., 814, where the court construed the word judgment under the code practice of Texas.

The essential feature of "judgment" is that it shall be final and conclude the parties. In this sense final orders, although not technical judgments, are judgments within this sense for the reason that they conclude the parties.

The disposition of a writ of *habeas corpus* has been held to be a judgment within the Code of Civil Procedure of Montana in State *vs.* Newell, 35, p. 28.

"Under most codes of procedure, judgments are defined

in substance as the final determination of the rights of the parties in an action or proceeding." 33 C. J., 1049. It is submitted that this action of Judge Diaz, which it is to be noted is called "resolution" and not "order," is a judgment within the meaning of the statute for the reason that it concludes the parties.

It is not interlocutory. It is a proceeding which "may in effect put an end to the action and present a judgment from which appeal might be taken." 3 C. J., 438, where the proceedings are set out from which an appeal may be taken.

It is to be noted in this case that the appeal is taken by writ of error on exception. That is to say, the appellant goes up to the Supreme Court as of right on a final proceeding and not with leave of the appellate court on some interlocutory proceeding.

It is submitted that the effect of a stay of these proceedings such as is effected by the taking of an appeal is to entirely prevent any enforcement of the order vacating the receiver. "The general rule is that a supersedeas or stay does not vacate the judgment, order, or decree appealed from or reverse, annul, or undo what has already been done under it, but does suspend all further proceedings thereon or as to any matter embraced therein and prevents, pending the appeal, any steps to enforce or carry the same into effect. 3 C. J., 1319.

"The general rule is that the effect of a supersedeas or stay is to suspend proceedings and preserve the *status quo* pending the determination of the appeal or proceeding in error." 3 C. J., 315, citing many cases.

It is submitted further that Section 144 of the Code above cited was not intended to and does not limit the stay of pro-

ceedings provided in it solely to cases in which a money judgment is involved, but provides in general for the prevention of carrying into effect of any proceeding by the court which amounts to a judgment in the broad sense above set forth. That execution is not to be confined to a money judgment alone has been held in the following cases:

State *vs.* Cline, 39 S. W., 272, where it was held:

> "The term execution with reference to a stay of execution during proceedings on appeal comprehends not merely the ordinary writ of execution to collect money, but also any and all process to enforce any affirmative command of a judgment whatsoever its nature."

and, again, in State *vs.* Hirzel, 37 S. W., 921, where it was held:

> "That the enforcement of an interlocutory order for the appointment of a receiver is within the scope of the term execution."

It is submitted that the enforcement of an order which is not interlocutory for the removal of a receiver is equally within the scope of the term "judgment." This can scarcely be doubted when sections 123 and 144 of the Code are read together.

Supplementing their remarks on page 67 of the brief, wherein reply is made to the contention of the plaintiff that the removal of the petitioner has been upheld by the Supreme Court of the Philippine Islands, counsel for the petitioner respectfully call the attention of the court to the following statement of the law in this regard, which occurs in 34 Cyc., at page 146:

> "Whenever the court has jurisdiction of the subject-matter and of the necessary parties its action in regard to the appointment of a receiver cannot be questioned in collateral proceedings, whether erroneous or not. However erroneous such an order may be, it is binding, not only upon the parties, but upon everyone and everywhere, until it is vacated in a direct application, or reversed by superior authority. Shields *vs.* Coleman, 157 U. S., 168; Gumby *vs.* Armstrong, 66 C. C. A., 627; Shinney *vs.* Savings Co., 97 Fed., 9; Grand Trunk R. R. Co. *vs.* Central R. R. Co., 85 Fed., 87; Clark *vs.* Brown, 57 C. C. A., 76; and if the party to the suit whose property is placed in the hands of a receiver is bound by the order or decree, no one can attack it. Grand Trunk R. R. Co. *vs.* Central R. R. Co., *supra.*

Since counsel for the plaintiff can only support his above-mentioned allegation by the decision of the Supreme Court of Philippine Islands in the case of Behn, Meyer *vs.* Hamburg Amerika Line, it is submitted that the above statement entirely refutes his contention. Any attack made in the case of Behn, Meyer *vs.* Hamburg Amerika Line upon a receiver appointed in the case of Behn, Meyer *vs.* Stanley *et al.* would of necessity be collateral. If the Supreme Court of the Philippine Islands in the case of Behn, Meyer *vs.* Hamburg Amerika Line has in fact passed upon the validity of the appointment of Joseph as receiver, then it is reversable error on appeal to this court. The order of Judge Harvey stands until reversed by superior authority, which so far has not occurred; or until directly attacked, which was done in the motion of Menzi to vacate the receivership. This action

of Judge Diaz has been appealed and has not yet been decided. Therefore the Supreme Court of the Philippine Islands has not yet properly decided that Joseph is not receiver for Behn, Meyer and Co., Ltd.

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